

12266

United States
Court of Appeals
For the Ninth Circuit.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Appellant,

vs.

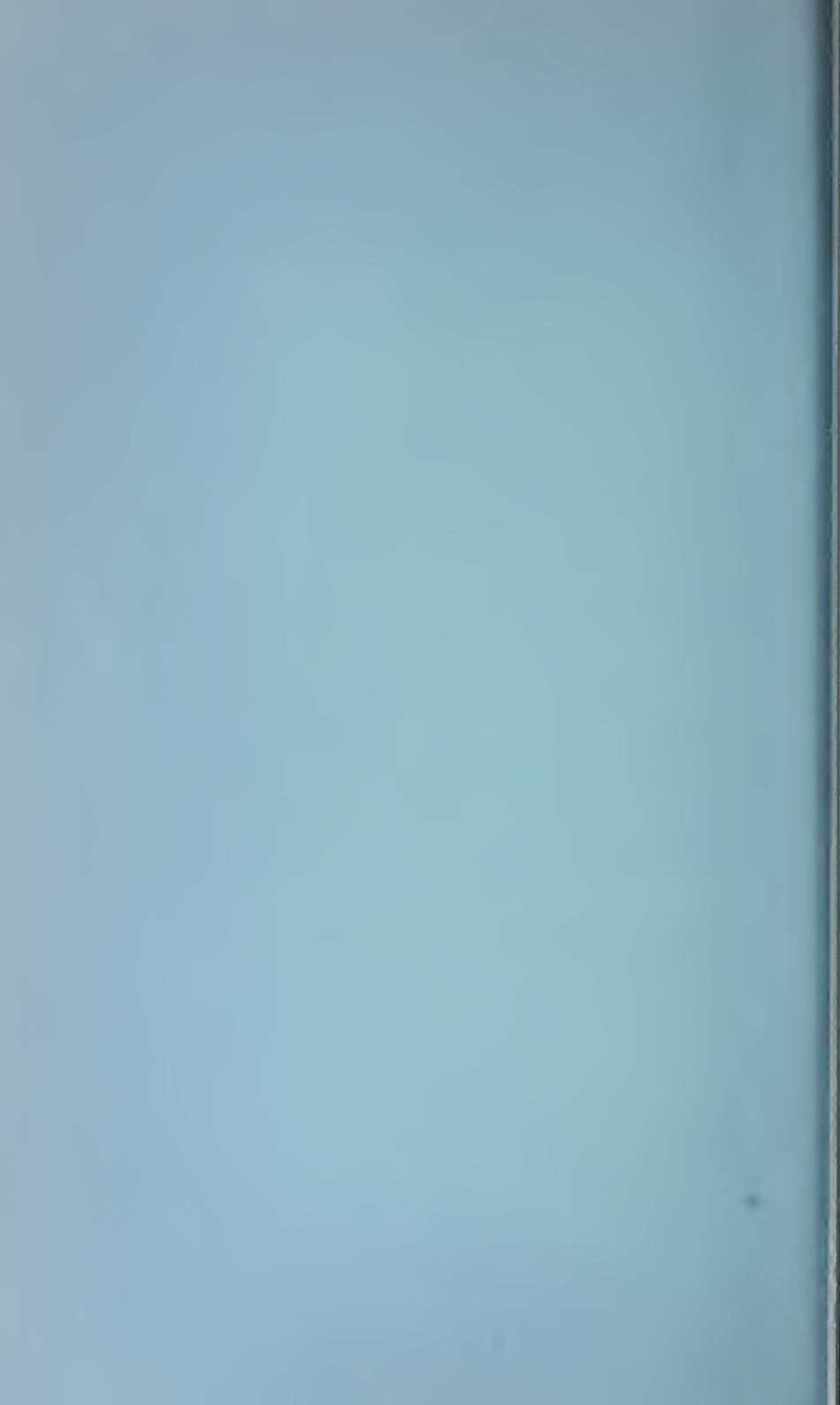
MOSES D. SIMRANY,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Arizona.

AUG - 5 1949

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
in and for the District of Arizona

Civ. 450—Tuc.

MOSES D. SIMRANY,

Plaintiff,

vs.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Defendant.

AMENDED COMPLAINT

Comes now the plaintiff herein and for cause of
action alleges:

I.

Jurisdiction of these proceedings is conferred upon this Court by the provisions of Title 28, U. S. Code, Section 2201; Title 8, U. S. Code, Section 701 (a); Title 28, U. S. Code, Section 1331; and is for a declaratory judgment to establish the right of the plaintiff to retain, without molestation, a certificate of lawful entry and to restrain the defendant from cancelling or attempting to cancel all records of registry and certificate of lawful entry issued to the plaintiff pursuant to the provisions of Title 8, U. S. Code, Section 728. The value of the matter in controversy exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

That the plaintiff is a resident of the District of

Arizona, in the City of Tucson, County of Pima, State of Arizona; that the plaintiff is married and that the plaintiff's wife is a citizen of the United States; and that the plaintiff has been a resident of the County of Pima, State of Arizona, for more than one year last past.

That the defendant, W. P. Jeager, is the Officer in charge of the business and affairs of the Office of Immigration and Naturalization located in Tucson, Arizona.

III.

That pursuant to the provisions of Title 8, U. S. Code, Section 728, the plaintiff did apply for registry as an alien in the United States prior to July 1, 1924, with respect to whom there was no record of arrival, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization did make a record of registry pursuant to the provisions of said Title 8, U. S. Code, Section 728, and did issue to the plaintiff a certificate of lawful entry, No. 155838.

IV.

That the plaintiff is now qualified to file with the District Court of the United States for the District of Arizona, a petition for admission to citizenship of the United States and now desires to file with the Immigration and Naturalization Service, an application for a certificate of arrival as prescribed by Title 8, U. S. Code, Section 729, to enable him to file said petition of Naturalization pursuant to the provisions of Title 28, U. S. Code, Section 732.

V.

That the Commissioner of Immigration and Naturalization has adopted what is referred to as Part 385, Title 8, of Federal Regulations; that by the provisions of said Part 385, the Commissioner has undertaken to specify the procedure to be followed in what he refers to as a proceeding for cancellation; that the defendant pursuant to the provision of said Part 385 is now threatening to cancel said record of registry and to revoke said certificate of lawful entry, and is claiming a right to effect such revocation pursuant to the provisions of Title 8, U. S. Code, Section 740, and the provisions of said Part 385; and said defendant is alleging that said record of registry and certificate of lawful entry were procured by false statements, and has ordered this plaintiff to appear before him and show cause why said record of registry and certificate of lawful entry should not be revoked.

VI.

That neither Title 8, U. S. Code, Section 740, nor any other provision of law confers upon the Commissioner of Immigration and Naturalization authority to adopt the provisions of said Part 385, Title 8, of Federal Regulations for cancellation of said record of registry and certificate of lawful entry, nor upon said defendant the authority to cancel said record of registry and revoke said certificate of lawful entry, and the defendant's attempts to conduct the proceeding to cancel said record of registry and revoke said certificate of lawful entry are in excess of his statutory jurisdiction, author-

ity or right, and will deprive the plaintiff of his statutory right to have his petition for naturalization passed upon by a Court.

VII.

That there is no procedure for review of the defendant's action in said cancellation and revocation proceedings and should said defendant revoke said record of registry and cancel said certificate of lawful entry, this plaintiff will have no adequate remedy at law for such unlawful action.

Wherefore, plaintiff prays this Court to enter its decree declaring that:

1. The defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry heretofore made and issued to this plaintiff.

2. The defendant be restrained from proceeding with what defendant characterizes as a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 of the Code of Federal Regulations.

/s/ NOLEN L. McLEAN,

/s/ EDWARD W. SCRUGGS,

Attorneys for Plaintiff.

State of Arizona,
County of Pima—ss.

Moses D. Simrany, being first duly sworn, deposes and says:

That he has read the foregoing Complaint and

knows the contents thereof, and all matters of fact therein stated are true.

/s/ MOSES D. SIMRANY.

Subscribed and sworn to before me this 19th day of October, 1948, by Moses D. Simrany.

[Seal] /s/ NOLEN L. McLEAN,
Notary Public.

My Commission expires 3/20/50.

Copy received this 21st day of October, 1948.

/s/ F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Oct. 21, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, by the United States Attorney in and for the District of Arizona and moves the Court to dismiss the Amended Complaint filed herein for the reasons that:

1. The Complaint fails to state a claim against the defendant upon which relief can be granted for the reason that this Officer is merely the servant conducting proceedings for superior officers having the power to decide.

2. The Complaint should be dismissed for the

reason that it pleads no actual controversy between the plaintiff and this defendant.

F. E. FLYNN,
U. S. Attorney.

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorney for Defendant.

Memorandum of Points and Authorities

1. The defendant W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, is not a proper party as the defendant is not empowered to cancel the record of registry or to revoke the certificate of lawful entry.

8 U. S. C. 728 (a)(b)(c) 729(a)
8 C. F. R. Part 385

2. This action is premature as no actual controversy exists.

28 U. S. C. 400, as amended.

Macauley vs. Waterman S S Corporation,
327 U. S. 540.

Myers vs. Bethlehem Shipbuilding Corp.,
303 U. S. 36.

Wettre vs. Hague,
74 F. Supp. 396.

Received copy this 1 day of Nov., 1948.

/s/ EDWARD W. SCRUGGS,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 1, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Comes now the plaintiff and in opposition to the defendant's Motion to Dismiss, directs the Court's attention to the following authority,

W. H. Neher v. A. E. Harwood,
(128 F. (2d) 846), 158 A.L.R. 1116,

in which the United States Circuit Court of Appeals, Ninth Circuit, held that when a superior officer was without authority to act at all, so that his direction to a subordinate is of no validity, his joinder is unnecessary. By reference to the amended complaint filed herein the applicability of this holding will become apparent.

NOLEN McLEAN,
SCRUGGS & BUTTERFIELD.

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

Copy received this 18th day of November, 1948.

/s/ F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Nov. 18, 1948.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM

It is the plaintiff's understanding from the observations of the Court at the hearing on the defendant's motion to dismiss the amended complaint, that the Court accepts the proposition of law in the case of *Neher vs. Harwood*, cited by the plaintiff at the argument, but that the Court is of the opinion that the plaintiff, in the instant case, has failed to show where he plaintiff will receive any relief or benefit by either injunction or declaratory judgment prayed for in the amended complaint. On this premise, the Court read the complaint, setting out only the allegations with respect to the actions of the defendant sought to be restrained, stating:

“* * * That the defendant, W. P. Jeager, is the Officer in charge of the business and affairs of the Office of Immigration and Naturalization located in Tucson, Arizona * * *

“That the defendant, pursuant to the provisions of said Part 385, is now threatening to cancel said record of registry and to revoke said Certificate of Lawful Entry and is claiming a right to effect such revocation * * * and has ordered the plaintiff to appear before him and show cause why said record of registry and Certificate of Lawful Entry should not be revoked * * *”

and the Court then pointed out that the Commissioner of Immigration is the only officer capable of performing those acts.

From the foregoing, the Court noted that the defendant is charged by the plaintiff with seeking to revoke the record of registry and Certificate of Lawful Entry. The defendant contends that only the Commissioner of Immigration and Naturalization could revoke such a certificate and cited the statute under which this proceeding is brought. The position of the plaintiff is that even the Commissioner of Immigration and Naturalization has no such power. The section of the statute cited by the defendant as the basis for the cancellation proceeding does not confer power upon the Commissioner to do anything except as is set up in that statute. The record of registry and Certificate of Lawful Entry are not such documents as may be cancelled. If the Court will consider Title 8, U.S.C., Section 740, in connection with the rest of the Nationality Act, the Court will observe that citizenship in all but a few instances is granted by a Court and jurisdiction to grant citizenship is conferred upon courts of record, Title 8, U.S.C., Section 701. Certificates of naturalization are to be issued by the clerk of the Court conferring the citizenship. Certain certificates of citizenship which have nothing to do with naturalization in the main, but only with exceptional cases, are permitted to be issued by the Commissioner of Immigration and Naturalization, Title 8, U.S.C., Section 739; 1002. Revocation of naturalization is covered by Title 8, U.S.C., Section 738, and provides for a Court cancelling a certificate. The plaintiff is in the position of charg-

ing that the defendant is taking an act to revoke a record of registry. He seeks to have the defendant restrained from proceeding in any way to effect such revocation. For the government to say that only the Commissioner can do so is to beg the issue. The Commissioner by his regulations has set up that he may do so in Part 385 referred to in the complaint, but his authority to set up Part 385 under which the defendant is acting upon is not extant.

However, if the Court is of the same view as was indicated at the hearing, the plaintiff now requests leave to amend his complaint by adding to Paragraph V thereof the following allegations:

“That the defendant is acting pursuant to the provisions of Title 5 U.S.C., Section 1004, in conducting a proceeding to cancel the plaintiff’s record of registry and Certificate of Lawful Entry, in that said defendant has been designated under said section to conduct a hearing which is an essential part of such cancellation proceeding; that in the event that said defendant is allowed to proceed with said hearing, said record of registry and Certificate of Lawful Entry may be cancelled; that if said Certificate is cancelled the plaintiff will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8, U.S.C., Section 732-(c) to be filed with a petition for naturalization and which must be obtained by the plaintiff before he can file such a petition; that by preventing the plaintiff from filing such a petition for naturalization, he will be de-

prived of his right to have a Court pass upon his qualifications for citizenship."

And the plaintiff further asks to be allowed to amend his prayer for relief by asking in addition to the matter heretofore prayed for the following allegations:

"3. That the defendant be restrained from conducting any hearing as a part of any proceeding to revoke his the plaintiff's record of registry and Certificate of Lawful Entry.

4. That the Court declare that the defendant has no right under any law of the United States to conduct a hearing as a part of a proceeding to cancel the plaintiff's record of registry and Certificate of lawful entry."

The Court will notice from the foregoing that the defendant in concert with the Commissioner is seeking to do an unlawful act in a lawful manner. This is one of the things that the world is now confronted with everywhere; that is the sham which the communists use when they seize a government. They do not seize the government openly as an aggressor, but instead use their procedural machinery as authority to do acts which normally are considered beyond the power of government. That is what the defendant is seeking to do here. If the plaintiff can restrain the procedure, he can defeat the exercise of the unlawful act. It is true the Court may say "Restraining this officer may not give you complete relief for another may be designated to con-

duct the hearing.” In answer to this the plaintiff will necessarily be forced to bring another restraining order against such other. However, the cancellation proceeding, as it is charged, will be conducted always in a lawful manner with respect to procedure to effect the exercise of the unlawful ultimate act, for the Commission nor the defendant has not yet urged that he is not to be governed by the procedure required by Title 5 U.S.C., Section 1001, et. seq., and particularly Title 5 U.S.C., Section 1004.

NOLEN McLEAN,
EDWARD W. SCRUGGS.

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 8, 1949.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

Applicable Statutes and Regulations

The original application by Moses D. Simrany, plaintiff herein for a certificate of lawful entry, is based on the provisions of the Nationality Act of 1940, 8 U.S.C. 728(a). The revelant portions are as follows:

1. Section 328(a):

“The Commissioner shall cause to be made for

use in complying with the requirements of this chapter a registry of each person arriving in the United States * * *."

2. Section 328(b):

"Registry of aliens at ports of entry, required by subsection A of this section, may be made as to any alien, not ineligible to citizenship, in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner in accordance with regulations prescribed by the Commissioner with the approval of the Attorney General that such alien:

(3) is a person of good moral character."

3. Section 328(c):

Upon making of such record of registry the alien in question

"* * * shall be deemed to be lawfully admitted to the United States for permanent residence as of the date of such entry."

4. Section 329(a):

"The certificate of arrival required by this chapter may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner with the approval of the Attorney General upon the making of a record of registry, as authorized by Section 328 of this Act."

5. Section 740:

"The Commissioner is authorized to cancel any certificate of citizenship or any copy of a declara-

tion of intention or certificate of naturalization heretofore or hereafter issued by the Commissioner, or Deputy Commissioner, if it would appear to the Commissioner's satisfaction that such document was illegally or fraudulently obtained from the Commissioner or Deputy Commissioner."

Pursuant to the authority cited above the Commissioner of Immigration, with the approval of the Attorney General, issued regulations providing for the procedure to be followed in the administration of this Act, 8 Code of Federal Regulations:

1. Part 362—Registry of Aliens under Nationality Act of 1940.

A. Par. 362.7 Facts Essential to be Established. "It must be established to the satisfaction of the Commissioner of Immigration and Naturalization * * * (e) that he is a person of good moral character * * *."

B. Par. 362.11 Authorization or Denial; procedure thereafter. "If the Commissioner of Immigration and Naturalization is satisfied from the record and accompanying documents that the applicant is entitled to registry, an order to that effect will be entered on Form N-130." "* * * If the Commissioner of Immigration and Naturalization is not satisfied from the record and accompanying documents that the applicant is entitled to registry the application shall be denied and the head of the District wherein the application was filed advised of the action."

2. Part 385—Revocation of Records Created and of Naturalization and Citizenship Documents issued by the Commissioner:

A. 385.1 Report and Notice. "If at any time after certification of lawful entry has been issued, under part 362 of this chapter, or a certificate of naturalization has been issued, under part 378 * * * evidence becomes available indicating that such record or document was obtained illegally or fraudulently complete report shall be promptly submitted to the Central Office or the appropriate Director with comment and recommendation; if the Commissioner or Deputy Commissioner is satisfied that a prima facia showing has been made that such record or document was obtained illegally or fraudulently he shall cause such District Director to have served * * * notice * * * that proceeding has been instituted to cancel the record or document * * *."

B. 385.2 Answer. * * * Upon receipt of such response or answer or upon expiration of time allowed for showing good cause the record shall be closed and forwarded to the Commissioner accompanied by findings of fact, conclusions of law and the recommendation of the official assigned * * * together with comment and recommendation of the District Director."

C. 385.3 If the Commissioner finds the record or document, or both, were procured illegally or through fraud he shall cancel ab initio such record or document or both.

This action by the plaintiff is pursued under the

provisions of the Declaratory Judgment Statute, 28 U.S.C. 2201, which provides the following:

“In case of actual controversy within its jurisdiction, except with respect to Federal taxes. Any Court of the United States upon the filing of an appropriate pleading will declare the rights and other legal regulations of any interested party seeking such declaration whether or not further relief is, or could be, sought. Any such declaration shall have the force and effect of a final judgment or a decree and shall be reviewable as such.”

It is apparent from an examination of the provisions of applicable statutes, quoted above, that plaintiff's case is improperly taken for the reasons:

1. The officer in charge is not a proper party defendant. An examination of the provisions of the Nationality Act of 1940, as set out above, in each instance grants the power of action to the Commissioner. The only authority granted the officer in charge is to conduct a hearing, make recommendations and forward the file to the Commissioner for action. It therefore follows that the orders of this Court directed to the officer in charge, the defendant herein, would accomplish nothing. An order of this Court restraining the officer in charge from proceeding with the hearing would not prevent the Commissioner of Immigration from refusing to grant the certificate required by the plaintiff in his Petition for Citizenship. It is apparent that the Commissioner of Immigration is an indispensable party. The plaintiff apparently perceived this

as his original pleadings named the Commissioner of Immigration as a party defendant.

2. The action taken is premature because no actual controversy exists, as required by the Declaratory Judgment Act, 28 U.S.C. 2201. It has long been settled that a person who seeks in a Court action to question an administrative proceeding must first exhaust his administrative remedies.

Macauley vs. Waterman S. S. Corp.,
327 U.S. 540;

Myers vs. Bethlehem Shipbuilding Corp.,
303 U.S. 36;

Wettre vs. Hague,
74 Fed. Supp. 396.

3. The Commissioner has the statutory authority to revoke a certificate of lawful entry and to make regulations governing the procedure to be followed in revocation.

It is the opinion of the defendant that sufficient power of revocation is vested in the Commissioner by the foregoing statute. The Certificate of Lawful Entry is merely one document in the procedure provided to acquire citizenship status. The statute quoted above (8 U.S.C. 740) should be given a reasonable interpretation and not strained to limit its application to a specific enumerated document, rather than all documents which go to make up the citizenship record.

The plaintiff has also objected to the legality of the regulations issued by the Commissioner, the rele-

vant portions of which are set out above. While it is not believed necessary in this action to argue the merits or the right of the Commissioner to make these regulations for the reason that the proper parties are not before the Court the statute specifically gives the Commissioner authority to make regulations

8 U.S.C. 328(b), 329(a)

and reasonable regulations issued by the Commissioner have the force and effect of law.

United States vs. Smull,

236 U.S. 405;

Rosen vs. United States,

245 U.S. 467;

Haff vs. Shee,

63 Fed. 2d 191.

In summary it is defendant's position that plaintiff's action must fail for the following reasons:

1. The Commissioner of Immigration is an indispensable party and not within the jurisdiction of this Court.

2. The defendant officer in charge is not a proper party as his functions are merely ministerial.

3. The Declaratory Judgment Act is not available as no actual controversy exists until plaintiff has exhausted his administrative remedies.

4. The Commissioner of Immigration has adequate statutory authority to

- (a) make regulations providing for the revocation of a certificate of lawful entry;
- (b) revoke the certificate of lawful entry.

F. E. FLYNN,

U. S. Attorney for the
District of Arizona.

/s/ DON HUMMEL,

Assistant U. S. Attorney,
Attorney for Defendant.

Received copy this 14th day of January, 1949.

/s/ EDWARD W. SCRUGGS,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 14, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF

The defendant has quoted at length the statutes which he asserts apply to support his motion. He argues that because the Commissioner of Immigration has power to prescribe regulations to carry out the provisions of the Nationality Act, that power carries with it authority to provide the regulations referred to in this proceeding as Part 385. He ignores the fact that Part 385 goes beyond the purview of the act. The history of administrative bodies is one of construing the rule-making power beyond the purport of acts conferring it. The at-

tempt has been made so often that courts have had occasions frequently to pass upon the power and have always held that unless the rule is to carry out some purpose of the act the rule is ineffective; hence, for Part 385 to be effective the act itself must confer the power which the regulations are designed to make operative. Hence, the necessity of determining whether or not the act confers upon the Commissioner of Immigration the power to do anything looking toward the cancellation of a record of registry and certificates of lawful entry. The defendant attempts to justify Part 385 with this language:

“The Certificate of Lawful Entry is merely one document in the procedure provided to acquire citizenship status. The statute quoted should be given a reasonable interpretation and not strained to limit its application to a specific enumerated document, rather than all documents which go to make the citizenship record.”

The defendant ignores the fact that naturalization proceeding insofar as this plaintiff is concerned is a court matter, as would be any attempt to cancel the certificate of citizenship of the plaintiff. To follow the defendant's reasoning to its ultimate conclusion is to say that even though the plaintiff may have had United States citizenship conferred upon him, the defendant could under Part 385 revoke and set aside the record of registry and certificate of lawful entry and ignore completely the fact that cancellation of the plaintiff's citizenship would es-

sentially have to be conducted and obtained through a court proceeding.

The defendant further contends in his brief that under the Declaratory Judgment Act a person seeking a declaratory judgment must first exhaust his administrative remedies. That would be true perhaps were the action taken to review or declare a judgment with reference to matters which were within the power of the officers acting. Where the power is claimed unlawfully and the administrative regulation is beyond the power of the officers the Declaratory Judgment is proper. In this instance, Part 385 is subject to a declaratory judgment with respect to the defendant who is acting under it. Part 385 is a rule of the type referred to in Title 5, Section 1003. There is no administrative procedure to be exhausted with respect to the validity of Part 385. The contention of the plaintiff is simply that the defendant is acting legally as to procedure, but illegally as to his right to act at all. His entire act being illegal and without authority, the plaintiff is entitled to a restraining order and a judgment so declaring.

NOLEN McLEAN,

EDWARD W. SCRUGGS,

By /s/ EDWARD W. SCRUGGS,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff in his amended complaint states that he is an alien who arrived in the United States prior to July 1, 1924, but no record was made of his arrival; that he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b), Title 8, United States Code, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization made a record of registry and issued to plaintiff a certificate of lawful entry, No. 155838; that the defendant is now threatening to cancel said record of registry and revoke said certificate of lawful entry, on the ground that said record of registry and said certificate were procured by false statements, and has ordered plaintiff to appear before him and show cause why said record of registry and certificate should not be revoked.

Plaintiff prays for the entry of a decree by the court declaring that defendant has no right to cancel the record of registry or to revoke the certificate of lawful entry heretofore made and issued to plaintiff and that he be restrained "from proceeding with what defendant characterizes as a revocation or cancellation proceeding pursuant to the provisions of part 385 of Title 8 of the Code of Federal Regulations." Defendant has moved to dismiss. The present defendant is not authorized by law to cancel the record of registry or revoke the certificate of

lawful entry, but it appears from the allegations of the original complaint, the amended complaint and the statements of counsel in their briefs and oral argument, that the Commissioner has directed defendant to conduct a hearing to determine whether the registry of lawful entry was procured by fraud; and if the Commissioner concludes from the evidence taken that it was so procured he will cancel the record of registry and revoke the certificate. Such action would be seriously harmful to plaintiff. If, as plaintiff contends, the Commissioner is not authorized by law to cancel the registry and revoke the certificate, I think plaintiff is entitled to an injunction restraining the hearing, provided the court may, in a proceeding to which the Commissioner is not a party, grant such relief. Two questions therefore are presented for determination, first, whether the Commissioner has lawful authority to cancel the record and revoke the certificate and, second, if he has not, whether in this proceeding to which he is not a party the court may enjoin the defendant, a subordinate officer, from carrying out the order of the Commissioner to hold a hearing.

First: The Nationality Act of 1940, Title 8, United States Code, provides, Section 728, that in cases of aliens who arrived in the United States prior to 1924 and as to whom there is no record of entry for permanent residence the Commissioner of Immigration and Naturalization upon a proper showing as to the actual entry of the alien prior to July 1, 1924, that he has resided continuously in

the United States since such entry and that he is a person of good moral character and not subject to deportation, may make an entry of registry of the entrance of such person and the time and place thereof; and upon the making of such record of registry the alien shall be deemed, for the purpose of naturalization to have been lawfully admitted to the United States for permanent residence as of the date of such entry.

The Act further provides (Sec. 740) that the Commissioner may cancel any certificate of citizenship or any copy of a declaration of intention or certificate of naturalization theretofore or thereafter issued by the Commissioner if it shall appear to the Commissioner's satisfaction that such document was illegally or fraudulently obtained.

It will be noted that the Act does not in terms authorize the Commissioner to cancel records of arrival or certificates of lawful entry. Counsel for the Government contend that power to do so may be implied from the authority specifically granted. I do not think so. In *Stark v. Wickard*, 321 U. S. 288, 309, the court said:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted.”

See also *Arrow-Hart & H. Co. v. Commissioner*, 291 U. S. 587, 598. As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to

become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.

Second: May the court in this proceeding wherein the Commissioner is not a party, enjoin the hearing before Jaeger as officer in charge of Immigration and Naturalization Service in Tucson? The problem of when a court may issue an injunction to restrain the acts of a subordinate administrative official if the superior whose orders the subordinate is about to carry into effect is not a party, was presented to the Circuit Court of Appeals of this Circuit in *Neher vs. Harwood*, 128 F(2d) 846. The court found in reviewing the decisions that there had been much confusion in the Federal Courts on this question and it made a thorough examination of the facts in and the holdings of the courts in a great number of the cases in which the question had been presented, and came to the conclusion that where the complaint is that the superior officer is abusing a discretion legally vested in him he is a necessary party to the action, but where it is charged and the question for determination is whether the order of the superior is beyond his authority, the superior is not a necessary party. That is the situation here. The motion to dismiss will be denied. An order accordingly will be entered Monday, February 14, 1949, at 10 o'clock a.m.

/s/ HOLLY,
Judge.

[Endorsed]: Filed Feb. 9, 1949.

In the District Court of the United States in
and for the District of Arizona

No. Civil 450—Tucson

MOSES D. SIMRANY,

Plaintiff,

vs.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Defendant.

JUDGMENT

This matter having come on regularly before the court on a motion to dismiss filed by the defendant and directed to the plaintiff's amended complaint, and the court having ruled thereon and denied said motion, and the attorney for the defendant having appeared in open court and announced that the defendant will stand upon his motion to dismiss and will take no further action in these proceedings and declined to file an answer herein; and the plaintiff having moved orally for judgment on the pleadings and the record and the court being fully advised in the premises, does find:

1. That the plaintiff is a resident of the District of Arizona, City of Tucson, County of Pima, State of Arizona, and has been a resident thereof for more than one year last past; that the defendant, W. P. Jeager, is the officer in charge of the business

and affairs of the Office of Immigration and Naturalization, located in Tucson, Arizona.

2. That pursuant to the provisions of Title 8, U. S. Code, Section 728, the plaintiff did apply for registry as an alien in the United States prior to July 1, 1924, with respect to whom there was no record of arrival, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization did make a record of registry pursuant to the provisions of said Title 8, U. S. Code, Section 728 and did issue to the plaintiff a certificate of lawful entry, No. 155838.

3. That the plaintiff is now qualified to file with the District Court of the United States for the District of Arizona, a petition for admission to citizenship of the United States and now desires to file with the Immigration and Naturalization Service, an application for a certificate of arrival as prescribed by Title 8, U. S. Code, Section 729, to enable him to file said petition of Naturalization pursuant to the provisions of Title 28, U. S. Code, Section 732.

4. That the Commission of Immigration and Naturalization has adopted what is referred to as Part 385, Title 8 of Federal Regulations; that by the provisions of said Part 385, the Commissioner has undertaken to specify the procedure to be followed in what he refers to as a proceeding for cancellation; that the defendant pursuant to the provisions of said Part 385 is now threatening to cancel said record of registry and to revoke said certificate

of lawful entry, and is claiming a right to effect such revocation pursuant to the provisions of Title 8, U. S. Code, Section 740 and the provisions of said Part 385; and said defendant is alleging that said record of registry and certificate of lawful entry were procured by false statements, and has ordered this plaintiff to appear before him and show cause why said record of registry and certificate of lawful entry should not be revoked. That the defendant is acting pursuant to the provisions of Title 5, U. S. C., Section 1004 in conducting a proceeding to cancel the plaintiff's record of registry and certificate of lawful entry, in that said defendant has been designated under said section to conduct a hearing which is an essential part of such cancellation proceeding; that in the event that said defendant is allowed to proceed with said hearing, said record of registry and certificate of lawful entry may be cancelled; that if said certificate is cancelled the plaintiff will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8, U. S. C., Section 732-(c) to be filed with a petition for naturalization and which must be obtained by the plaintiff before he can file such a petition; that by preventing the plaintiff from filing such a petition for naturalization, he will be deprived of his right to have a Court pass upon his qualifications for citizenship.

5. That neither Title 8, U. S. Code, Section 740 nor any other provision of law confers upon the

Commissioner of Immigration and Naturalization authority to adopt the provisions of said Part 385, Title 8 of Federal Regulations for cancellation of said record of registry and certificate of lawful entry, nor upon said defendant the authority to cancel said record of registry and revoke said certificate of lawful entry, and the defendant's attempts to conduct the proceeding to cancel said record of registry and revoke said certificate of lawful entry are in excess of his statutory jurisdiction, authority or right, and will deprive the plaintiff of his statutory right to have his petition for naturalization passed upon by a Court.

Wherefore, It Is Ordered, Adjudged and De-
creed:

That the Commissioner of Immigration and Naturalization has no lawful authority to cancel the record of registry and certificate of lawful entry issued to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728;

That the defendant as the officer in charge of the Immigration and Naturalization Service in Tucson, Arizona, has no lawful authority to conduct a hearing as a party of any proceeding to cancel a record of arrival and certificate of lawful entry issued to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728;

That the defendant be and he is restrained from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate

of lawful entry made with respect to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728.

Dated at Tucson, Arizona, this 18th day of March, 1949.

/s/ HOLLY.

Approved as to form:

/s/ DON HUMMEL,

Assistant U. S. Attorney.

[Endorsed]: Filed and entered in Civil Docket March 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the judgment entered herein on the 18th day of March, 1949, denying defendant's motion to dismiss plaintiff's amended complaint, the entering of the order restraining defendant from conducting a hearing as part of a proceeding to revoke the record of registry and certificate of lawful entry and the decision that the Commissioner

of Immigration and Naturalization has no authority to cancel the record of registry and certificate of lawful entry.

F. E. FLYNN,
U. S. Attorney.

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorneys for Defendant.

Copies of the above notice mailed this 13th day of May, 1949, to Nolen McLean and Edward W. Scruggs, attorneys for plaintiff.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It is hereby stipulated that the record and proceedings to be included in the record of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court of Arizona, in the above-entitled matter are as follows:

- (a) Amended Complaint;
- (b) Defendant's Motion to Dismiss;
- (c) Plaintiff's Memorandum of Authority in Opposition to Defendant's Motion to Dismiss;
- (d) Plaintiff's Supplemental Memorandum;
- (e) Defendant's Reply Brief;

- (f) Plaintiff's Reply Brief;
- (g) Court's Memorandum;
- (h) Judgment;
- (i) Notice of Appeal;
- (j) This Stipulation.

F. E. FLYNN,
U. S. Attorney,

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorney for Appellant.

SCRUGGS & BUTTERFIELD,

By /s/ EDWARD W. SCRUGGS,
Attorneys for Appellee.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Moses D. Simrany, Plaintiff, versus W. J. Jaeger, Officer in Charge of Immigration and Naturalization Service

in Tucson, Arizona, Defendant, numbered Civ-450 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case and designated in the Stipulation As To Record filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

- (a) Amended Complaint;
- (b) Defendant's Motion to Dismiss;
- (c) Plaintiff's Memorandum of Authority in Opposition to Defendant's Motion to Dismiss;
- (d) Plaintiff's Supplemental Memorandum;
- (e) Defendant's Reply Brief;
- (f) Plaintiff's Reply Brief;
- (g) Court's Memorandum;
- (h) Judgment;
- (i) Notice of Appeal;
- (j) Stipulation as to Record.

Witness my hand and the seal of said Court at Tucson, Arizona, this 9th day of June, 1949.

WM. H. LOVELESS,
Clerk,

[Seal] By /s/ CATHERINE A. DOUGHERTY
Chief Deputy Clerk.

[Endorsed]: No. 12266 United States Court of Appeals for the Ninth Circuit. W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, Appellant, vs. Moses

D. Simrany, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 12266

W. P. JAEGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Appellant,

vs.

MOSES D. SIMRANY,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Now comes the United States of America by Frank E. Flynn, United States Attorney for the District of Arizona, and Don Hummel, Assistant United States Attorney, and presents the following statements of points on which appellant intends to rely on appeal, to-wit:

1. The District Court erred in concluding as a matter of law that the Nationality Act of 1940 did

not authorize the Commissioner of Immigration to cancel records of registry or certificates of lawful entry.

2. The District Court erred in making a ruling with respect to the authority of the Commissioner of Immigration to cancel the record of registry and certificate of lawful entry when the Commissioner was not a party to this suit and not within the jurisdiction of this Court.

3. The District Court erred in ruling that the defendant Officer in Charge of Immigration and Naturalization Service has no lawful authority to conduct a hearing as a party of any proceedings to cancel the record of registry and certificate of lawful entry issued to plaintiff and in restraining defendant from conducting such a hearing.

4. The District Court erred in denying defendant's Motion to Dismiss plaintiff's Amended Complaint.

FRANK E. FLYNN,
U. S. Attorney for the
District of Arizona,

/s/ DON HUMMEL,
Assistant U. S. Attorney.

Copy received this 20th day of June, 1949.

/s/ EDWARD W. SCRUGGS,
Attorney for Moses B. Simrany.

[Endorsed]: Filed and Docketed June 20, 1949.

United States of America,
District of Arizona—ss.

I hereby certify that the foregoing is the original
of Appellant's Statement of Points filed in Case
No. Civ-450 Tucson, on June 20, 1949.

[Seal] /s/ WM. H. LOVELESS,
Clerk of the U. S. District Court, District of
Arizona.



No. 12266

IN THE
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

W. P. JEAGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	}	<i>Appellant,</i>
vs.		
MOSES D. SIMRANY,	}	<i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLANT

FRANK E. FLYNN,
*United States Attorney for the
District of Arizona.*

DON HUMMEL,
Assistant U. S. Attorney.

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IN THE
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

W. P. JEAGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	}	<i>Appellant,</i>
vs.		
MOSES D. SIMRANY,	}	<i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLANT

JURISDICTION

This appeal involves a suit instituted against W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona. The amended complaint was filed October 21, 1948.

The appellee, an alien, arrived in the United States prior to July 1, 1924. No record was made of his arrival, so he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b),

Title 8 U.S.C.A. Upon this application a record of registry was entered and a certificate of lawful entry was issued to appellee.

Claiming that the certificate of lawful entry and record of registry were procured by false statements, the appellant ordered appellee to appear before him and show cause why said record of registry and certificate of lawful entry should not be cancelled (Plaintiff's complaint, T.R. 4). This action on the part of appellant was pursuant to the procedure specified by the Commissioner of Immigration and Naturalization under authority of Part 385 of Title 8 C.F.R. and Section 740, Title 8 U.S.C.A. (T.R. 4).

The complaint, after setting out the above facts, prays for a decree:

1. That the defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry; and
2. That the defendant be restrained from proceeding with a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 C.F.R. (T.R. 5).

The appellant interposed a motion to dismiss the complaint on the ground that no controversy existed between the parties, and that the superior officer, namely, the Commissioner of Immigration and Naturalization (in this brief hereinafter referred to as Commissioner), having power to decide, was a necessary party (T.R. 6). The motion to dismiss was denied February 9, 1949 (T.R. 26), and judgment was entered March 18, 1949, restraining the appellant from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate of lawful entry (T.R. 31).

Notice of appeal was timely filed May 13, 1949, pursuant to the provisions of Section 2107, Title 28 U.S.C.A. (T.R. 32). This Court has jurisdiction by virtue of the provisions of Section 1291, Title 28 U.S.C.A.

QUESTIONS PRESENTED

1. Whether the defendant is a proper party defendant and whether the Commissioner of Immigration and Naturalization is a necessary party defendant.
2. Whether the Commissioner of Immigration and Naturalization has authority to cancel records of registry or certificates of lawful entry.
3. Whether the plaintiff is entitled to the relief asked for in the amended complaint and granted by the Court, without first exhausting his administrative remedies.

STATUTES INVOLVED

Title 8 U.S.C.A., Section 728 (a) [Section 328 (a) of the Nationality Act of 1940], provides that:

“The Commissioner shall cause to be made, for use in complying with requirements of this subchapter, a registry of each person arriving in the United States * * *.”

Title 8 U.S.C.A., Section 728 (b), directs:

“Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

- (1) Entered the United States prior to July 1, 1924;
- (2) Has resided in the United States continuously since such entry;
- (3) Is a person of good moral character; and
- (4) Is not subject to deportation."

Title 8 U.S.C.A., Section 728 (c), directs that upon the making of such a record of registry, the alien in question

"shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of such alien's entry."

Title 8 U.S.C.A., Section 729(a), provides that:

"The certificate of arrival required by this subchapter may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by Section 728 of this Act."

Title 8 U.S.C.A., Section 727(b), provides that:

"The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization * * *."

Part 362, Title 8 C.F.R., is a regulation issued under the authority of Sections 458, 727, 728 and 742 of Title 8 U.S.C.A., authorizing the procedure for carrying out the provisions of Section 728(b), Title 8 U.S.C.A.

Part 385 of Title 8 C.F.R. is a regulation issued by the Commissioner authorizing the hearings for the

revocation of records and of naturalization and citizenship documents issued by the Commissioner, and particularly covers record of registry and certificate of lawful entry.

STATEMENT

We believe that the statement in this brief under "JURISDICTION" contains a statement of all facts necessary for a determination of this appeal. We will, however, briefly summarize them.

Appellee, an alien, entered the United States prior to July 1, 1924. No record was made of his arrival.

Upon application, the Commissioner made a record of registry and issued a certificate of lawful entry pursuant to Section 728(b), Title 8 U.S.C.A.

The Commissioner, claiming that the record of registry and certificate of lawful entry were obtained by false representation, directed the appellant to conduct a hearing, and the appellant, pursuant to such directions, ordered the appellee to appear before him and show cause why the record of registry and certificate of lawful entry should not be revoked.

Appellee sought by this action to restrain appellant from proceeding with such hearing.

Appellant's motion to dismiss the amended complaint was denied (T.R. 26).

Judgment was entered restraining appellant from conducting any hearing as a part of any procedure to revoke the record of registry and the certificate of lawful entry (T.R. 31).

STATEMENT OF POINTS TO BE URGED

The appellant relies upon the following errors as a basis for this appeal (T.R. 35, 36) :

1. The District Court erred in concluding as a matter of law that the Nationality Act of 1940 did not authorize the Commissioner of Immigration to cancel records of registry or certificates of lawful entry.

2. The District Court erred in making a ruling with respect to the authority of the Commissioner of Immigration to cancel the record of registry and certificate of lawful entry when the Commissioner was not a party to this suit and not within the jurisdiction of this Court.

3. The District Court erred in ruling that the appellant Officer in Charge of Immigration and Naturalization Service has no lawful authority to conduct a hearing as a part of any proceedings to cancel the record of registry and certificate of lawful entry issued to appellee and in restraining appellant from conducting such a hearing.

4. The District Court erred in denying appellant's Motion to Dismiss appellee's amended complaint.

ARGUMENT

All of the assigned errors are based on the right of the Commissioner to direct the appellant to hold the hearing. If he had the right to direct the holding of such a hearing, he necessarily would have the right to cancel the record of registry and certificate of lawful entry and would be a necessary party.

To determine the issues on this appeal we must assume that the record of registry and certificate of

lawful entry were procured by false statements. Appellee's complaint states that that is the ground upon which appellant was threatening to proceed with the hearing (T.R. 4).

Under the statutory provisions which have been quoted, only the Commissioner is authorized to grant an application for registry, to issue a certificate of lawful entry, and to issue a certificate of arrival. The regulations empower the Commissioner to cancel such documents which have been fraudulently obtained.

8 *C.F.R.* 385.1, 385.3.

The Officer in Charge merely is authorized to serve the notice inaugurating the administrative proceeding, to receive the respondent's answer, to conduct a hearing, and to make recommendations to the Commissioner.

8 *C.F.R.* 385.1, 385.2, 385.3.

The action is premature because appellee has not exhausted his administrative remedies. It has long been the settled law that a person who seeks in a court action to question an administrative proceeding must first exhaust his administrative remedies.

Macauley v. Waterman S.S. Corp.,
327 U.S. 540, at 544.

Myers v. Bethlehem Shipbuilding Corp.,
303 U.S. 41.

Wettre v. Hague, 74 Fed. Sup. 396.

Appellee has made no attempt to exhaust his administrative remedies and it follows from the authorities cited that his suit was prematurely brought. The court below had no jurisdiction under Section 2201, Title

28 U.S.C.A., the Declaratory Judgment Act, because there was no actual controversy between the parties, and there can be no actual controversy until the administrative proceeding is completed and a determination adverse to the appellee is made. Appellee contended in the court below that in the event the Commissioner ruled against him and cancelled his certificate of lawful entry, he would have no redress as the regulation makes no provision for a review of the Commissioner's action. For that reason appellee contends that he would suffer irreparable injury, which would justify the intervention by a court at this time. As a matter of fact, he has not suffered any damage of any kind or any injury at this time. In case of an adverse ruling by the Commissioner and an attempt to deport the appellee, he then would have the right to sue out a writ of habeas corpus, and in the event he makes application for citizenship he could then challenge the action of the Commissioner. There is, therefore, no necessity for any determination of his rights at this time.

In the case of *Macauley v. Waterman S.S. Corp.*, supra, the district court dismissed the complaint on the ground that respondent had failed to exhaust its administrative remedies. The Court of Appeals reversed, and the Supreme Court reversed the Court of Appeals. We quote from page 545 of the opinion:

"The district court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies."

The appellee has not questioned the proposition of law that a superior who has the right and authority to make the decision is a necessary party; nor does appellee question the proposition of law that under such circumstances the appellee must first exhaust his administrative remedies.

Appellee contended in the court below, however, that the statutes do not give the Commissioner power to revoke the record of registry or the certificate of lawful entry; nor does it give him the power to issue the regulation (Part 385, Title 8 C.F.R.), and that there is no administrative procedure to be exhausted with respect to the validity of Part 385 (T.R. 22).

The Commissioner is authorized to issue the registry and certificate upon a showing, among other things, that the applicant "is a person of good moral character" (Section 728(b), Title 8 U.S.C.A.). The certificate of arrival may be issued in accordance with *regulations prescribed by the Commissioner* (Section 729(a), Title 8 U.S.C.A.).

The certificate is issued by the Commissioner administratively, and it seems reasonable to assume that it can be revoked administratively. The regulation involved in this case is certainly a reasonable one. Its purpose is to provide the means to right a wrong where a fraud has been perpetrated upon the Government.

It seems inconceivable that Congress intended to sanction the perpetration of frauds. To say that the Commissioner has no authority to strip from the wrongdoer the benefits which were never rightfully his is to put a premium on frauds against the Government, and would place the practitioners of fraud in an invulnerable position once their fraudulent design had been completed. Fraud may vitiate any transaction. That principle definitely applies where the fraud is practiced against the Government.

United States v. Bell Telephone Co.
128 U.S. 315.

In the case just cited it was claimed that the Government was without remedy to revoke a patent obtained through fraud. In discussing this matter the court said:

“It assumes that the government, which has thus been imposed upon and deceived, is utterly helpless, and that it can take no steps to correct the evil or to redress the fraud. If such a fraud were practised upon an individual, he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; but it is said that the government of the United States—the representative of sixty millions of people, acting for them, on their behalf, and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited.”

Similar observations have been made with relation to proceedings to revoke naturalization certificates obtained through fraud.

Knauer v. United States, 328 U.S. 654.

Johannessen v. United States, 225 U. S. 227.

In the latter case the court quotes from Chief Justice Parker in *Foster v. Essex Bank*, 16 Mass. 273:

“There is no such thing as a vested right to do wrong.”

It is true that the foregoing cases involve judicial proceedings to vacate documents obtained through fraud, but the proceedings were judicial in such cases only because that was the method of attack chartered by statute. In the present case there is no statutory direction that court proceedings be instituted. Therefore, we must rely on the regulations as a necessary and proper method of providing means for annulling certificates obtained by fraud.

In line with the foregoing reasoning, we call the Court's attention to the only reported decision on the point involved.

Dopico v. Revell, 73 Fed. (2d) 221.

In the above case, as in this, a certificate of registry was issued to an applicant. Subsequently it was discovered that he induced the issuance of the certificate through fraudulent concealment of a criminal record. An administrative proceeding to revoke the certificate of registry was had, and upon the evidence presented, the Commissioner directed that the certificate be cancelled. Thereafter deportation was ordered. The alien brought habeas corpus proceedings, claiming that the Commissioner had exceeded his authority in attempting to cancel his certificate of registry. The court proceeding was unsuccessful and the appellate court, in its opinion, said:

“The sole question involved here is whether the certificate of registry was lawfully cancelled. . . In considering the legality of the cancellation the court below was limited in its inquiry as to whether, after a fair hearing, the determination of facts by the department was supported by substantial evidence and whether the law was correctly applied . . . A study of the record shows conclusively that there was substantial evidence upon which the determination as to the cancellation of the certificate of registry was based and the action of the judge below in dismissing the petition for the writ of habeas corpus was proper and is accordingly affirmed.”

In the case just quoted from, the authority of the Commissioner was challenged, and his acts were upheld by the court. The fact that the case was heard and determined by the court on its merits supports the Government's argument in this case to the effect that the

action was premature and that the appellee has, and at the proper time will have, an adequate remedy at law.

CONCLUSION

We respectfully submit that:

1. Regulation Part 385, Title 8 C.F.R., is a valid and reasonable regulation. It does not conflict with any statutory provisions and represents a consistent administrative interpretation which should not be disturbed unless clearly wrong.

Brewster v. Gage, 280 U. S. 327.

Constanzo v. Tillinghast, 287 U. S. 341-345.

2. Under the regulation, and impliedly under the statutes cited, the Commissioner was authorized to direct appellant to conduct the proceedings for the cancellation of the certificate of lawful entry.

3. The Commissioner is a necessary party.

4. The action is premature because appellee has not exhausted his administrative remedies.

5. The appellee has an adequate remedy at law.

6. The motion to dismiss the complaint should have been granted and the judgment of the District Court should be reversed.

Respectfully submitted,

FRANK E. FLYNN,
*United States Attorney for the
District of Arizona.*

DON HUMMEL,
Assistant U. S. Attorney.
Attorneys for Appellant.